LIBRARY

Supreme Court, U.S.
FILED
JUN 22 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

70-320

No. ~~1865~~

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others Similarly Situated,
Petitioners,

v.

MONTGOMERY WARD & CO., Incorporated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals.
for the Eighth Circuit

SIGAL & SAVELKOUL
DONALD C. SAVELKOUL
SAMUEL I. SIGAL
1020 Plymouth Building
Minneapolis, Minnesota 55402
Attorneys for Petitioners

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

INDEX

	Page
Prayer	1
Opinions below	1
Jurisdiction	2
Question presented	2
Statutory provisions and regulations involved	2
Statement of the case	3
Reasons for granting the writ	7
1. Case involves important question of first impression	7
2. Class action involved	8
3. Millions of consumers and many nationwide catalog merchandisers affected	8
4. Lower courts decision is a serious hindrance to effective enforcement	9
Conclusion	10
Appendix A—Opinion of Eighth Circuit Court of Appeals	A-1
Appendix B—Decision of District Court	A-8
Appendix C—Statutory provisions	A-12
Appendix D—Statutory regulations	A-19

Cases Cited

American Federation of Musicians v. Wittstein, 379 U. S. 171 7
Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387 8
Patterson v. Lamb, 329 U. S. 539 8
Rice v. Sioux City Cemetery, 349 U.S. 70 8
Rothensies v. Electric Battery Co., 329 U. S. 296 9

Statutes Cited

15 U.S.C., § 1637(c) 3
15 U. S. C., § 1640(a) 2, 8, 9
28 U. S. C., § 1254(1) 2

Text Cited

Standard & Poor's Industry Surveys, Retailing, Volume 2 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others Similarly Situated,
Petitioners,

v.

MONTGOMERY WARD & CO., Incorporated,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

The Petitioners William F. Jordan and William A. Rogers on behalf of themselves and all others similarly situated respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding May 3, 1971.

OPINIONS BELOW

The opinion below of the Court of Appeals is reported at ... F. 2d ... (8th Cir., 1971); Commerce Clearing House, Instalment Credit Guide, Consumer Credit, Para. 99,502 (*infra*, pp. A-1–A-7). The opinion of the District Court is reported at 317 F. Supp. 948 (D. C., Minn., 1970) (*infra*, in relevant part, pp. A-8–A-11).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on May 3, 1971. A timely petition for re-hearing was denied on May 20, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C., § 1254(1).

QUESTION PRESENTED

Whether a catalog consumer credit customer has the same right of action under the civil liability provisions of the Truth in Lending Act as a non-catalog consumer credit customer, or, in restated form, whether a merchandiser's catalog containing credit terms differing from his original disclosure and not in compliance with Truth in Lending is mere advertising under that Act, regardless of the statements therein contained and the reliance thereon by consumers who are thereby induced to purchase, and therefore the civil liability provisions do not apply.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. 15 U. S. C., § 1640 (a), provides:

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the lia-

bility under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

2. The provisions of the Truth in Lending Act are contained in Title I of the Consumer Credit Protection Act (Public Law 90-321; 82 Stat. 146), and in relevant part set forth *infra*, pp. A-12–A-18.

3. Pursuant to the Act, the Federal Reserve Board has issued Regulation Z, 12 CFR 226, and in relevant part set forth *infra*, pp. A-19–A-26.

STATEMENT OF THE CASE

This action is brought by the petitioners on behalf of themselves and all others similarly situated under the Truth in Lending Act. The petitioners are catalog purchasers of the respondent, a retail merchant whose sales in substantial part are derived from its catalog operations.

Respondent had a so-called "open end consumer credit plan" for its customers. After the enactment of Truth in Lending, and in accordance with 15 U. S. C. § 1637 (c), *infra*, it sent out notices to its customers containing in part the following information:

"MONTGOMERY WARD CHARG-ALL ACCOUNT AGREEMENT

Montgomery Ward & Co., Incorporated: With respect to my Wards Charg-all account, I agree to the following regarding all purchases made by me or on my Charg-all Identification Plate:

1. I will pay the time sale price for all purchases, consisting of the cash sale price and a *finance charge* at

a periodic rate of 1½% per month (minimum charge 50¢) on the previous month's ending balance of my account (*annual percentage rate* 18%). I may at any time pay the full amount due.

2. Payment will be made by me in monthly installments equal to a minimum of 1/20th of my highest account balance adjusted to the next dollar amount (minimum $5). However, if within 30 days from my billing date I pay the full outstanding balance shown on my monthly statement, no *finance charge* on such balance will be charged on any subsequent statement.

3. Title to the goods purchased hereunder, except for motor vehicle purchases, shall remain in you until the unpaid balance of each separate purchase is fully paid. Upon default by me, my entire balance shall at your option become due and payable.

4. It is understood that the applicable Charg-All Agreement used by you in the state of my residence shall govern my purchases."

Unlike the consumer who shops in a retail establishment, a typical catalog purchaser examines the catalog at home and then places his order by filling out an order blank contained in the catalog, or by calling the catalog department and placing the order by telephone.

William F. Jordan purchased merchandise from Ward's "Great 1970 Winter Sale" catalog. The particular page from which the purchase was made contained the following heading in conspicuous circular form: "PRE-SEASON SPECIAL, No Monthly Payments Till June".[1]

[1] The specific catalog pages from which the purchases were made are listed as exhibits in the Appendix in the Circuit Court proceedings, together with other pertinent pages from the same catalogs.

William A. Rogers purchased merchandise from a similar catalog of Ward's in September, 1969. The catalog statement of Wards in connection with this purchase was: "NO MONTHLY PAYMENTS TILL FEBRUARY when you order stereo on credit at Wards—see page 3". An additional page in this catalog contained the following language: "NO MONTHLY PAYMENT TILL FEBRUARY on appliances and home furnishings ordered on credit from any Ward's catalog or store." Also on that same page appears the statement: "If your order is being added to an account that is already opened, there will be no monthly payment increase til February, 1970."

Subsequently, it was learned that Wards imposed finance charges on these purchases based on purchase dates, and not based on dates when the monthly payments were first due. The finance charges imposed were in the amount of 1½ per cent per month, based on the previous month's ending balance, a minimum of 18 per cent per annum.

Paragraph 7 of the complaint provides as follows:

> "7. While so engaged in advertising for sales, making credit sales, and sending periodic statements to plaintiffs and the members of their class which plaintiffs represent, defendant has violated and continues to violate the Act of Congress of May 29, 1968, 82 Stat. 146 et seq. (15 U. S. C. A. Section 1601, et seq.), and the Regulations which were adopted pursuant to said Act, and which are contained in Regulation Z, 12 CFR 226, in the following respects, among others:
>
> a. By failing to disclose that any finance charge is being imposed on items offered for sale and all as required by 12 CFR 226.10;
>
> b. By failing to disclose and express its applicable minimum finance charge in excess of fifty (50) cents in terms of an annual percentage rate

in accordance with the requirements of Regulation Z, 12 CFR 226.5 (a) (3) (i) and Section 127 of the Act of Congress of May 29, 1968, 32 Stat. 153 (15 U. S. C. A., Section 1637 (b) (6));

c. By stating that no payments whatsoever are required until some future date, without disclosing the imposition of a finance charge thereon;

d. By containing numerous pages of advertisements of products and prices without any reference to the imposition of finance charges;

e. By failing to disclose on its periodic statements that the periodic rate exceeds 1.5% per month and an annual percentage rate of eighteen per cent (18%) because credit is not given for payments made and returns made during the billing cycle;

f. By failing to disclose the amount of the balance to which each annual percentage rate is applicable in accordance with the requirements of Regulation Z, 12 CFR 226.7 (b) (6) and Section 127 of the Act of Congress of May 29, 1968, 82 Stat. 153 (15 U. S. C. A., Section 1637 (b) (5));

g. By failing to make all required disclosures in a clear and conspicuous manner as required by Regulation Z, 12 CFR, Section 226.6 (a); and

h. By separating the required disclosures so as to confuse, mislead and obscure or detract attention from the information required to be disclosed as prohibited by Regulation Z, 12 CFR 226.7 (c) (4)."

On motion of respondent to strike, which the District Court treated as a motion to dismiss, subparagraphs a, c and d were dismissed for lack of jurisdiction over the subject matter. On appeal, the Circuit Court reinstated subparagraph c.

The Courts below held, in short, that a merchandiser's catalog is mere advertising, and as such, however deficient under Truth in Lending, may not support an action for civil liability. In effect, it was held that catalogs could only be considered under Part C of the Truth in Lending Act, which relates to credit advertising, and that they could not be considered under Part B which relates to credit transactions and which contains the civil liability section, even though a consumer transaction occurred and a violation of Part B could be shown by the use of the catalog involved.

REASONS FOR GRANTING THE WRIT

1. Case involves important question of first impression

The question presented is an important one of first impression under the Truth in Lending Act, and is therefore a basis for granting certiorari. **American Federation of Musicians v. Wittstein**, 379 U. S. 171, 175. The lower court has held, in effect, that a catalog merchandiser is only required to give an initial disclosure, and then follow up with periodic statements with respect to purchases made (these would arrive after the unknown finance charges had commenced), and that new and non-complying representations by the merchandiser in his catalog are not governed by Part B of the Truth in Lending Act. The result here is that the purchaser who thought he was to pay "x" dollars commencing in June for merchandise purchased in January subsequently learns it is "x" dollars plus 1.5% compounded monthly from January, which is an entirely different plan than contained in the original disclosure. An important credit term, i.e. the date on which the finance charge is to commence, was not disclosed.

2. Class action involved

The question presented is not confined to the petitioners William Jordan and William Rogers. They have instituted this proceeding as a class action to include all others similarly situated. But the question involved goes far beyond the entire class in this particular suit and the particular respondent merchandiser.

3. Millions of consumers and many nationwide catalog merchandisers affected

The issue involves catalog purchasers throughout the United States and catalog merchandisers throughout the United States. The amount of catalog selling by giant retail merchants such as respondent is in the billions of dollars of annual sales, most of which is on credit.[2] The question is whether catalog consumers are to have the same rights under the Truth in Lending Act for violations thereof as other consumers—whether they can use the catalog to prove a credit disclosure violation under Part B of Truth in Lending where the catalog has caused a consumer credit transaction to occur. In our view, the catalog customer can prove he has a right of action under 15 U. S. C. 1640 (a), *supra*, of Part B even though the non-complying catalog may also be in violation of Part C relating to credit advertising. Catalog merchandisers mail their catalogs to valued customers, who should have the same rights as customers of non-catalog retailers who mail out non-complying disclosure amendments to their customers.

The issue therefore involves the consuming public generally and is a reason for granting certiorari. **Layne & Bowler Corp. v. Western Well Works**, 261 U. S. 387, 393; **Rice v. Sioux City Cemetery**, 349 U. S. 70, 79; **Patterson v. Lamb**, 329 U. S. 539.

---

[2] Standard & Poor's, Industry Surveys, Retailing, August 6, 1970, Volume 2, page R. 131.

4. Lower courts decision is a serious hindrance to effective enforcement

A fundamental purpose of the Truth in Lending Act was to provide consumers with information concerning the cost of credit. There is no reason to suppose that the Congress intended that catalog consumers be less informed than other consumers. As part of the statutory scheme for the enforcement of this act, Congress provided a civil right of action by consumers in 15 U. S. C. 1640 (a), *supra.* Catalog consumers who consummate consumer credit transactions in connection with non-complying catalogs are entitled to the same right of action where they can prove a failure to disclose required information under Part B, 15 U.S.C., § 1637(a), 12 Cfr 226.7(a), (e), (f) *infra.* There is no exemption in Part B for catalog merchandisers. The lower court has failed to distinguish between a catalog customer and a reader of an advertisement. As we read it, the legislative history cited by the lower court, does not relate to catalog purchasers who have entered into actual consumer credit transactions.

To deny a catalog consumer who has entered into a consumer credit transaction the right to proceed under 15 U. S. C., § 1640 (a) by dismissing allegations concerning the catalog and thus rendering the catalog inadmissible in evidence is a serious hindrance to effective administration of the law caused by the lower court decision. This is an additional reason for granting certiorari. **Rothensies v. Electric Battery Co.,** 329 U. S. 296. Without the catalog, there remains only the original disclosure and the periodic statement which is sent **after** purchase, both of which may be in compliance with the Truth-in-Lending Act.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

SIGAL and SAVELKOUL

DONALD C. SAVELKOUL

SAMUEL I. SIGAL
1020 Plymouth Building
Minneapolis, Minnesota 55402
Attorneys for Petitioners

June 21, 1971

APPENDIX A

(Opinion)

United States Court of Appeals
For the Eighth Circuit

No. 20,604

William F. Jordan and William A. Rogers, on Behalf of Themselves and All Others Similarly Situated,

Appellants,

v.

Montgomery Ward & Co., Incorporated,

Appellee.

Appeal from the United States District Court for the District of Minnesota.

[May 3, 1971.]

Before MATTHES, Chief Judge, VAN OOSTERHOUT and LAY, Circuit Judges.

MATTHES, Chief Judge.

This interlocutory appeal, pursuant to 28 U.S.C. §1292 (b), is focused upon the recently enacted Federal Truth in Lending Act, 82 Stat. 146 et seq. (1968) (15 U.S.C. §1601 et seq.) At issue is the propriety of the court's action in striking, on motion of the appellee, subpara-

graphs *a*, *c*, and *d* of paragraph 7 of Count I of appellants' complaint.[1]

In September of 1969 appellant Rogers purchased a stereo from appellee through its catalogue which contained the statement, "NO MONTHLY PAYMENTS TILL FEBRUARY *when you order stereo on Credit at Wards*—see *page* 3." Page 3 of the catalogue set forth in large capital letters, "NO MONTHLY PAYMENT TILL FEBRUARY ON APPLIANCES AND HOME FURNISHINGS ORDERED ON CREDIT FROM ANY WARDS CATALOG OR STORE." In smaller type on the same page the following statement is found, "If your order is being added to an account that is already open, there will be no monthly payment *increase* till February 1970."

In January, 1970, appellant Jordan purchased merchandise from appellee's "Great 1970 Winter Sale" catalogue which contained this statement conspicuously located in circular presentation, "PRE-SEASON SPECIAL *no monthly payments till June.*"

The appellants subsequently learned that the finance charges on these purchases were imposed from the date of the purchase rather than from the date payment was due, February and June respectively, as indicated by the catalogue. Appellants were thereby motivated to sue appellee on the theory that they were induced to make the purchases on credit because of the language of the alleged non-complying advertisement and were entitled to prosecute this private claim for relief pursuant to the civil liability provisions of the Truth in Lending Act.

The material part of Count I alleged that the jurisdiction of the court was founded on section 130 of the Act,

---

[1] All of Count II alleging violations of a Minnesota statute was stricken. The propriety of this action is not an issue on appeal.

15 U.S.C. §1640. The focal part of the complaint is paragraph 7:

> "7. While so engaged in advertising for sales, *making credit sales*, and sending periodic statements to plaintiffs [appellants] and the members of their class which plaintiffs [appellants] represent, defendant [appellee] has violated and continues to violate the Act of Congress of May 29, 1968, 82 Stat. 146 et seq. (15 U.S.C.A. Section 1601, et seq.), and the Regulations which were adopted pursuant to said Act, and which are contained in Regulation Z, 12 CFR 226, in the following respects, among others:
>
> "a. By failing to disclose that any finance charge is being imposed on items offered for sale and all as required by 12 CFR 226.10;
>
> "b. By failing to disclose and express its applicable minimum finance charge in excess of fifty (50) cents in terms of an annual percentage rate in accordance with the requirements of Regulation Z, 12 CFR 226.5 (a) (3) (i) and Section 127 of the Act . . .;
>
> "c. By stating that no payments whatsoever are required until some future date, without disclosing the imposition of a finance charge thereon;
>
> "d. By continuing numerous pages of advertisements of products and prices without any reference to the imposition of finance charges;
>
> "e. By failing to disclose on its periodic statements that the periodic rate exceeds 1.5% per month and an annual percentage rate of eighteen per cent (18%) because credit is not given for payments made and returns made during the billing cycle; . . . ." [Emphasis added]

Appellee challenged the complaint by motion and alleged that subparagraphs *a, c* and *d* of Paragraph 7 related only to credit advertising, were legally irrelevant to a private action, were not within the subject matter jurisdiction of the court, and should be stricken under Rule 12(f), Fed. R.Civ.P. The trial court granted the motion, and thereafter filed the requisite order for a § 1292(b) appeal, which we granted.

In its supporting memorandum opinion, the district court noted that the Truth in Lending Act deals separately with credit transactions and credit advertising. It concluded that the language and the legislative history of the Act supported the conclusion that Chapter 2, section 130 (15 U.S.C. § 1640) was not intended as a grant of jurisdiction to the courts for the purpose of granting relief for violations of the "Credit Advertising" provisions of the Act.

As we view this case in its present posture, the issue to be resolved is whether persons who plead that they were misled by and consummated credit transactions relying on advertisements not complying with the credit advertising provisions of the Act are entitled to maintain an action for civil liability as provided in Chapter 2 of the Act, specifically section 130. Appellants concede, as they must, that a person who merely sees a non-complying advertisement, but does nothing more, has no actionable claim. But they vigorously argue that where a purchase resulting in a credit transaction is made in reliance on the advertisement, the purchaser may maintain an action for civil liability under Chapter 2 of the Act. We disagree.

The Federal Truth in Lending Act is composed of three distinct Chapters:[2] Chapter 1—General Provisions, 15

[2] The Chapters were called "Part A, B, and C" respectively in the United States Code Annotated. The term "part" was also substituted for the term "Chapter" throughout the text of the Act as reproduced in U.S.C.A.

U.S.C. §§ 1601-13; Chapter 2—Credit Transactions, 15 U.S.C. §§ 1631-44; and Chapter 3—Credit Advertising, 15 U.S.C. §§ 1661-65. The language of section 108 (15 U.S.C. § 1607) and the legislative history evinces that Congress intended that the Act be enforced primarily by administrative agencies. However, provision is made for the institution of a civil action by an aggrieved debtor under specific circumstances. See H.R. Rep. No. 1040, 90th Cong., 2d Sess. (1968).[3] Section 130, found in the Credit Transaction Chapter of the Act, provides:

> "(a) Except as otherwise provided in this section, any creditor who fails in connection with any *consumer credit transaction* to disclose to any person any *information required under this chapter* to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
>
> (2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.
>
> . . . .
>
> "(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation." [Emphasis added]

There is no similar provision in the credit advertising chapter of the Act. In fact it appears that it was the intent of the Congress not to provide private civil relief

[3] Reprinted in 1968 U.S. Code, Cong. & Adm. News, p. 1962.

for violations of the credit advertising provisions. In the section by section analysis of the bill as presented to the House Banking and Currency Committee, the comment on the private civil penalty provision reads as follows:

> "This subsection sets forth civil penalties of double the finance charge with a minimum of $100 and a maximum of $1,000, for failure to comply with section 203 [essentially the provisions presently included in the credit transaction and credit advertising portions of the Act] (*other than the advertising requirements*)." [Emphasis added]

H.R. Rep. 1040 supra. The Report also states:

> "[T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties."

Consideration of the above legislative history in conjunction with Section 130 supports our conclusion that this section does not confer original subject matter jurisdiction in the federal courts over a claim of violation of the credit advertising provisions of the Act by private individuals. Rather, authority to enforce compliance with the credit advertising requirements is relegated to administrative agencies as provided in section 108 of the Act, 15 U.S.C. §1607.

Beyond doubt, as appellee recognizes, the civil penalties section creates a statutory remedy and confers jurisdiction on the district courts for actions brought thereunder. But this section is limited in its scope and application. We cannot extend either the ambit of the remedy so created or the jurisdiction of the district courts established by Congress in the Truth in Lending Act. It is well established that courts may not enlarge by construction the

language of a clear and unambiguous statute. *Beattie Investment Co. v. United States,* 101 F.2d 850 (8th Cir. 1939). To hold as appellants urge, would expand the jurisdictional and remedial purview of the civil penalties section past the boundaries of Congressional intent, thereby violating the rule proscribing judicial legislation. *Air Line Stewards and Stewardesses Ass'n, International v. Northwest Airlines, Inc.,* 162 F.Supp. 684 (1958), affd. 267 F.2d 170 (8th Cir.), cert. denied, 361 U.S. 901 (1959).

Subparagraph *a* of Paragraph 7 of the complaint relates only to violations of the disclosure provisions of the credit advertising part of the Act and Regulation Z. Similarly, subparagraph *d* concerns only the matter printed on the pages of appellee's catalogue. The remedy sought by appellants in their complaint and the jurisdiction of the district court to consider their claims is premised *only* upon §130, the civil penalties section, which do not apply to violations of the credit advertising chapter of the Act. Accordingly, we hold that the district court properly struck these subparagraphs from the complaint and affirm the court's order to this extent.

However, we find that subparagraph *c* may be construed as encompassing violations of the credit transaction chapter, which the civil penalties section was designed to remedy. Therefore, we find the district court erred in striking subparagraph *c* of Paragraph 7.

We affirm in part, reverse in part, and remand with directions to the district court to reinstate subparagraph *c* of Paragraph 7 of the complaint.

Costs shall be taxed equally.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Decision)

United States District Court
District of Minnesota
Fourth Division

William F. Jordan and William A. Rogers, on Behalf of Themselves and All Others Similarly Situated, and the State of Minnesota, Plaintiffs, vs. Montgomery Ward and Co., Incorporated, Defendant.	Order. No. 4-70-Civ. 145.

Defendant moved * * * to strike, pursuant to Rule 12(f), those portions of Count I, namely subparagraphs a, c and d of paragraph 7, which allege violations of the Credit Advertising provisions of the Truth in Lending Act, * * *.

The Court has heard arguments and examined the memoranda and affidavits submitted for its consideration. On the basis thereof, and on all the exhibits, files, records and proceedings,

It Is Ordered:

* * * * * * *

2. That defendant's motion to strike allegations contained in subparagraphs a, c and d of paragraph 7 of Count I be, and it hereby is, granted.

• • • • • • • •

September 9, 1970.

/s/ Earl R. Larson
United States District Judge

Memorandum Attached.

• • • • • • • •

MEMORANDUM

• • • • • • • •

Motion to Strike Portions of the Complaint Alleging Violation of Credit Advertising Provisions of the Truth in Lending Act

Provisions relating to disclosure of charges imposed in connection with sales on credit and provisions dealing with the advertising of credit terms are treated separately in the Truth in Lending Act. The former are contained in Chapter 2, sections 121 through 131 (15 U.S.C.A. 1631-41, 1970 Supp.), while the latter are in Chapter 3, sections 141-145 (15 U.S.C.A. 1661-65, 1970 Supp.).

The only provision creating a private right of action for violations of the Act appears in Chapter 2, section 130 (15 U.S.C.A., § 1640, 1970 Supp.). This section provides for civil liability for any creditor who "in connection with any consumer **credit transaction**" fails to disclose the "information required under this **chapter**."[1] (Emphasis added.) It is noteworthy that Chapter 2 is entitled "Credit Transactions" while Chapter 3 is en-

[1] 15 U.S.C.A. 1640 substitutes "part" for "chapter" in this phrase. That is because Chapters 1, 2, and 3 of the Act have been redesignated as parts A, B, and C, respectively, in U.S.C.A.

titled "Credit Advertising". This implies strongly that the phrase "this chapter" refers to Chapter 2 (Part B in U.S.C.A.; see note 1, *supra*) and does not create a right of action for a violation of Chapter 3 (Part C in U.S.C.A.; see note 1, *supra*). This conclusion is strengthened by examining other provisions of the Act and is legislative history.

Section 180c (15 U.S.C.A., § 1607(c)) vests overall enforcement authority in the Federal Trade Commission with respect to all creditors whose supervision is not specifically committed to other agencies. Most retail merchants, including the defendant in this action, fall within this residual category. A grant of a general nature such as this one alerts this Court to the fact that unless otherwise clearly indicated the remedies for violations of the Act were intended by Congress to be administrative in nature.

The legislative history of the Act lends further credence to defendant's position. The original enactment by the Senate contained no references at all to credit advertising. The House version originally contained a credit advertising provision but mentioned nothing about credit advertising violations, although it did provide civil penalties for wrongful disclosures concerning credit transactions. Later House versions of the bill specifically excluded the credit advertising provisions from application of the civil remedies provision. The final House version was the one adopted by Congress and, as already mentioned, provides separate chapters for "Credit Transactions" and "Credit Advertising" with the private right of action contained in the former. The House report accompanying the Act states:

> "[T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee

> to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties." H.R. 1040, 1968, USCCAN, p. 1976.

It is apparent from the foregoing that Chapter 2, section 130 of the Act was not intended as a grant of jurisdiction to this Court for purposes of granting relief for violations of the "Credit Advertising" provisions of the Act. The defendant's motion to strike those portions of the complaint alleging Chapter 3 violations must therefore be granted.

• • • • • • • •

Earl L. Larson

APPENDIX C

(Statutory Provisions)

15 U. S. C. § 1602 (e):

> The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

15 U. S. C. § 1602 (h):

> The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family, household, or agricultural purposes.

Section 108 (a), (c) of the Truth in Lending Act [15 U. S. C. § 1607(a), (c)]:

> (a) Compliance with the requirements imposed under this title shall be enforced under
>
> (1) section 8 of the Federal Deposit Insurance Act, in the case of
>
> (A) national banks, by the Comptroller of the Currency.
>
> (B) member banks of the Federal Reserve System (other than national banks), by the Board.
>
> (C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5(d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) the Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Acts to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) the Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

* * * * * * *

(c) Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a), the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the

Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

15 U. S. C. § 1611:

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this subchapter or any regulation issued thereunder.

• • • • • • • •

(3) otherwise fails to comply with any requirement imposed under this subchapter,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

15 U.S.C. § 1631 (a):

Each creditor shall disclose clearly and conspicuously, in accordance with the regulations of the Board, to each person to whom consumer credit is extended and upon whom a finance charge is or may be imposed, the information required under this part.

15 U.S.C. § 1637:

(a) Before opening any account under an open end consumer credit plan, the creditor shall disclose to the person to whom credit is to be extended each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including the time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects,

(A) the average effective annual percentage rate of return received from accounts under the plan for a representative period of time; or

(B) whenever circumstances are such that the computation of a rate under subparagraph (A) would not be feasible, or practical, or would be misleading or meaningless, a projected rate of return to be received from accounts under the plan.

The Board shall prescribe regulations, consistent with commonly accepted standards for accounting or statistical procedures, to carry out the purposes of this paragraph.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended under the plan, and a description of the interest or interests which may be so retained or acquired.

(b) The creditor of any account under an open end consumer credit plan shall transmit to the obligor, for each billing cycle at the end of which there is an outstanding balance in that account or with respect to which a finance charge is imposed, a statement setting forth each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the statement period.

(2) The amount and date of each extension of credit during the period, and, if a purchase was involved, a brief identification (unless previously furnished) of the goods or services purchased.

(3) The total amount credited to the account during the period.

(4) The amount of any finance charge added to the account during the period, itemized to show the amounts, if any, due to the application of percentage rates and the amount, if any, imposed as a minimum or fixed charge.

(5) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and, unless the annual percentage rate (determined under section 1606(a) (2) of this title) is required to be disclosed pursuant to paragraph (6), the corresponding nominal annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(6) Where the total finance charge exceeds 50 cents for a monthly or longer billing cycle, or the pro rata part of 50 cents for a billing cycle shorter than monthly, the total finance charge expressed as an annual percentage rate (determined under section 1606 (a) (2) of this title), except that if the finance charge is the sum of two or more products of a rate times a

portion of the balance, the creditor may, in lieu of disclosing a single rate for the total charge, disclose each such rate expressed as an annual percentage rate, and the part of the balance to which it is applicable.

(7) At the election of the creditor, the average effective annual percentage rate of return (or the projected rate) under the plan as prescribed in subsection (a) (5) of this section.

(8) The balance on which the finance charge was computed and a statement of how the balance was determined. If a balance is determined without first deducting all credits during the period, that fact and the amount of such payments shall also be disclosed.

(9) The outstanding balance in the account at the end of the period.

(10) The date by which, or the period (if any) within which, payment must be made to avoid additional finance charges.

(c) In the case of any open end consumer credit plan in existence on July 1, 1969, the items described in subsection (a) of this section, to the extent applicable, shall be disclosed in a notice mailed or delivered to the obligor not later than thirty days after that date.

15 U. S. C. § 1661:

For the purposes of this part, a catalog or other multiple-page advertisement shall be considered a single advertisement if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this part is clearly set forth.

15 U. S. C. § 1663:

No advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit under an open

end credit plan may set forth any of the specific terms of that plan or the appropriate rate determined under section 1637(a) (5) of this title unless it also clearly and conspicuously sets forth all of the following items.

(1) The time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates.

(5) Such other or additional information for the advertising of open end credit plans as the Board may by regulation require to provide for adequate comparison of credit costs as between different types of open end credit plans.

APPENDIX D

(Statutory Regulations)

Reg. Z, 12 CFR 226.6 (a), 226.7, 226.10 (a), (b) and (c):

SECTION 226.6—GENERAL DISCLOSURE REQUIREMENTS

(a) **Disclosures; general rule.** The disclosures required to be given by this Part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections. Where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part. Except with respect to the requirements of § 226.10, all numerical amounts and percentages shall be stated in figures and shall be printed in not less than the equivalent of 10 point type, .075 inch computer type, or elite size typewritten numerals, or shall be legibly handwritten.

SECTION 226.7—OPEN END CREDIT ACCOUNTS—SPECIFIC DISCLOSURES

(a) **Opening new account.** Before the first transaction is made on any open end credit account, the creditor shall disclose to the customer in a single written statement, which the customer may retain, in terminology consistent with the requirements of paragraph (b) of this section, each of the following items, to the extent applicable:

(1) The conditions under which a finance charge may be imposed, including an explanation of the time period, if any, within which any credit extended may be paid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge may be imposed.

(3) The method of determining the amount of the finance charge, including the method of determining any minimum, fixed, check service, transaction, activity, or similar charge, which may be imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) If the creditor so elects, the Comparative Index of Credit Cost in accordance with § 226.11.

(6) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(7) The conditions under which the creditor may retain or acquire any security interest in any property to secure the payment of any credit extended on the account, and a description or identification of the type of the interest or interests which may be so retained or acquired.

(8) The minimum periodic payment required.

(b) **Periodic statements required.** Except in the case of an account which the creditor deems to be uncollectable or with respect to which delinquency collection procedures have been instituted, the creditor of any open end credit account shall mail or deliver to the customer, for each billing cycle at the end of which there is an outstanding debit balance in excess of $1 in that account or with respect to which a finance charge is imposed, a statement or statements which the customer may retain, setting forth in accordance with paragraph (c) of this section each of the following items to the extent applicable:

(1) The outstanding balance in the account at the beginning of the billing cycle, using the term "previous balance."

(2) The amount and date of each extension of credit or the date such extension of credit is debited to the account during the billing cycle and, unless previously furnished, a brief identification[7] of any goods or services purchased or other extension of credit.

(3) The amounts credited to the account during the billing cycle for payments, using the term "payments," and for other credits including returns, rebates of finance charges, and adjustments, using the term "credits," and unless previously furnished, a brief identification[8] of each of the items included in such other credits.

(4) The amount of any finance charge, using the term "finance charge," debited to the account during the billing cycle, itemized and identified to show the amounts, if any, due to the application of periodic rates and the amount of any other charge included in the finance charge, such as a minimum, fixed, check service, transaction, activity, or similar charge,[9] using appropriate descriptive terminology.

(5) Each periodic rate, using the term "periodic rate" (or "rates"), that may be used to compute the finance

---

[7] Identification may be made on an accompanying slip or by symbol relating to an identification list printed on the statement.

[8] Identification may be made on an accompanying slip or by symbol relating to an identification list printed on the statement.

[9] These charges include any charges imposed by the creditor for the issuance, payment, or handling of checks, for account maintenance or otherwise, to the extent that such charges exceed any similar charges the customer is required to pay when an account is not being used to extend credit.

charge (whether or not applied during the billing cycle), and the range of balances to which it is applicable.

(6) The annual percentage rate or rates determined under § 226.5(a), using the term "annual percentage rate" (or "rates"), and, where there is more than one rate, the amount of the balance to which each rate is applicable. Where the creditor of the open end credit account imposes finance charges with respect to specific transactions during the billing cycle, such charges shall be combined with all other finance charges imposed during the billing cycle, and the annual percentage rate to be disclosed shall be determined by:

(i) Dividing the sum of all the finance charges imposed during the billing cycle by the sum of the balances to which the periodic rates apply (or by the average of daily balances if a daily periodic rate is used), plus the sum of the amounts financed to which the specific transaction charges apply, and

(ii) Multiplying the quotient (expressed as a percentage) by the number of billing cycles in a year.

(7) If the creditor so elects, the Comparative Index of Credit Cost in accordance with § 226.11.

(8) The balance on which the finance charge was computed, and a statement of how that balance was determined. If the balance is determined without first deducting all credits during the billing cycle, that fact and the amount of such credits shall also be disclosed.

(9) The closing date of the billing cycle and the outstanding balance in the account on that date, using the term "new balance," accompanied by the statement of the date by which, or the period, if any, within which, payment must be made to avoid additional finance charges.

(c) **Location of disclosures.** The disclosures required by paragraph (b) of this section shall be made on the face of the periodic statement, on its reverse side, or on the periodic statement supplemented by separate statement forms provided they are enclosed together and delivered to the customer at the same time, and further provided that

(1) The disclosure required by paragraph (b)(1) of this section, the amounts or respective totals of the amounts required to be disclosed under paragraph (b)(2), (3), and (4) of this section, and the disclosure required under paragraph (b)(6) and (9) of this section shall appear on the face of the periodic statement. If the amounts and dates of the charges and credits required to be disclosed under paragraph (b)(2) and (3) of this section are not itemized on the face or reverse side of the periodic statement, they shall be disclosed on a separate statement or separate slips which shall accompany the periodic statement and identify each charge and credit and show the date and amount thereof. If the disclosures required under paragraph (b)(4) are not itemized on the face or reverse side of the periodic statement, they shall be disclosed on a separate statement which shall accompany the periodic statement.

(2) The disclosures required by paragraph (b)(5) and (6) of this section and a reference to the amounts required to be disclosed under paragraph (b)(4) and (8) of this section, if not disclosed together on the face or the reverse side of the periodic statement, shall appear together on the face of a single supplemental statement which shall accompany the periodic statement.

(3) The face of the periodic statement shall contain one of the following notices, as applicable: "NOTICE: See reverse side for important information" or "NOTICE: See accompanying statement(s) for important informa-

tion" or "NOTICE: See reverse side and accompanying statement(s) for important information;" and

(4) The disclosures shall not be separated so as to confuse or mislead the customer or obscure or detract attention from the information required to be disclosed.

(d) **Finance charge imposed at time of transaction.** Any creditor, other than the creditor of the open end credit account, who imposes a finance charge at the time of honoring a customer's credit card, any other device, or form of identification for a purchase of property or services or for a cash advance to be debited to the customer's open end credit account shall make the disclosures required under paragraphs (b)(2) and (d) of § 226.8, *Credit other than open end—specific disclosures,* at the time of that transaction, and the annual percentage rate to be disclosed shall be determined by dividing the amount of the finance charge by the amount financed and multiplying the quotient (expressed as a percentage) by 12. If disclosure is made under this paragraph, the creditor of the open end credit account need make no further disclosure with respect to the finance charge on that transaction.

(e) **Change in terms.** If any change is to be made in terms of an open end credit account plan previously disclosed to the customer, the creditor shall mail or deliver to the customer written disclosure of such proposed change not less than 30 days prior to the effective date of such change or 30 days prior to the beginning of the billing cycle within which such change will become effective, whichever is the earlier date.

(f) **Open end credit accounts existing on July 1, 1969.** In the case of any open end credit account in existence and in which a balance remains unpaid on July 1, 1969, and which balance is deemed to be collectible and not subject to delinquency collection procedures, the items described

in paragraph (a) of this section, to the extent applicable, shall be disclosed in a notice mailed or delivered to the customer not later than July 31, 1969. If a customer subsequently utilizes such an account in existence on July 1, 1969, in which no balance remained unpaid on that date, and a notice required by paragraph (a) of this section has not previously been furnished that customer, then such notice shall be mailed or delivered to that customer before or with the next billing on that account.

SECTION 226.10—ADVERTISING CREDIT TERMS

(a) **General rule.** No advertisement to aid, promote, or assist directly or indirectly any extension of credit may state

(1) That a specific amount of credit or instalment amount can be arranged unless the creditor usually and customarily arranges or will arrange credit amounts or instalments for that period and in that amount; or

(2) That no downpayment or that a specified downpayment will be accepted in connection with any extension of credit, unless the creditor usually and customarily accepts or will accept downpayments in that amount.

(b) **Catalogs and multi-page advertisements.** If a catalog or other multiple-page advertisement sets forth or gives information in sufficient detail to permit determination of the disclosures required by this section in a table or schedule of credit terms, such catalog or multiple-page advertisement shall be considered a single advertisement provided:

(1) The table or schedule and the disclosures made therein are set forth clearly and conspicuously, and

(2) Any statement of credit terms appearing in any place other than in that table or schedule of credit terms clearly and conspicuously refers to the page or pages on

which that table or schedule appears, unless that statement discloses all of the credit terms required to be stated under this section. For the purpose of this subparagraph, cash price is not a credit term.

(c) **Advertising of open end credit.** No advertisement to aid, promote, or assist directly or indirectly the extension of open end credit may set forth any of the terms described in paragraph (a) of § 226.7, the Comparative Index of Credit Cost, or that no downpayment, a specified downpayment, or a specified periodic payment is required or any of the following items unless it also clearly and conspicuously sets forth all the following items in terminology prescribed under paragraph (b) of § 226.7.:

(1) An explanation of the time period, if any within which any credit extended may be paid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge may be imposed.

(3) The method of determining the amount of the finance charge, including the determination of any minimum, fixed, check service, transaction, activity, or similar charge, which may be imposed as a finance charge.

(4) Where one or more periodic rates may be used to compute the finance charge, each such rate, the range of balances to which it is applicable, and the corresponding annual percentage rate determined by multiplying the periodic rate by the number of periods in a year.

(5) The conditions under which any other charges may be imposed, and the method by which they will be determined.

(6) The minimum periodic payment required.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
23 1971
E. ROBERT SEAVER, CLERK

In The

Supreme Court of the United States

October Term, 1970

No. 70-3201

WILLIAM F. JORDAN and WILLIAM A. ROGERS, on Behalf of Themselves and All Others Similarly Situated,
Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

O'CONNOR, GREEN, THOMAS,
WALTERS & KELLY
KENNETH W. GREEN
JOE A. WALTERS
FRANK J. WALZ
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Respondent

1971—Northwest Brief Printing Co., 322 S. Fourth St., Minneapolis, 55415 338-5078

TABLE OF CONTENTS

	Page
Introduction	2
Statement of the Issue	2
Statutes Involved	2
Statement of the Case	7
Introduction to Argument	9
Argument:	
The Basic Structure of the Truth in Lending Act; Required Credit Disclosures v. Credit Advertisements	10
Chapter 2—Required "Initial" and "Periodic" Disclosures	10
Chapter 3—Credit Advertising	11
The Sole Civil Remedy—Violations of Chapter 2	12
Legislative History: Civil Remedy for Advertising Violations Withheld	13
Enforcement of Credit Advertising Provisions Reserved to Administrative Agencies	15
Conclusion	18

TABLE OF AUTHORITIES

Statutes:	Page
Truth in Lending Act. 15 U.S.C.A., §§ 1601-65:	
Section 108, 15 U.S.C.A., § 1607	4, 8, 16, 17
Section 112, 15 U.S.C.A., § 1611	5, 16
Section 127, 15 U.S.C.A., § 1637	7, 10, 11
Section 130, 15 U.S.C.A., § 1640	2, 5, 7, 8, 9, 12, 13
Section 141, 15 U.S.C.A., § 1661	6, 8, 11
Section 143, 15 U.S.C.A., § 1663	6, 11, 13
Consumer Credit Protection Act, (P.L. 90-321; 82 Stat. 146)	2
Federal Trade Commission Act, 15 U.S.C.A., § 41 et seq., Section 5, 15 U.S.C.A., § 45	16
28 U.S.C.A., § 1292	8
28 U.S.C.A., § 1254	2

Regulations: Page

Regulation Z:
12 C.F.R., § 226 7
12 C.F.R., § 226.2 11
12 C.F.R., §§ 226.5-6, 226.7 7
12 C.F.R., §226.10 ..... 8, 13

Rules:

Rules of the Supreme Court of the U. S., Rule 19 9

Legislative History Sources:

S. 5, 90th Cong., 1st Sess., January 11, 1967 13
S. 5, 90th Cong., 1st Sess., July 12, 1967 13
H.R. 11601, 90th Cong., 1st Sess., July 20, 1967 13
H.R. 11601, 90th Song., 1st Sess., November 30, 1967 .. 14
H.R. 11601, 90th Cong., 1st Sess., December 13, 1967 .. 14
H.R. 1040, 1968 U.S. Code Cong. & Ad. News, p. 1976 ... 10, 14
Cong. Rec., Jan. 30, 1968, p. H 502 15
Cong. Rec., Jan. 30, 1968, p. H 508 17

Administrative Rulings and Interpretations:

1 CCH, Consumer Credit Guide, ¶ 2,900 (1970) 14
3 CCH, Consumer Credit Guide, ¶ 30,034 (June 6, 1969) 14
3 CCH, Consumer Credit Guide, ¶ 30,408 (April 22, 1970) 14

In The

Supreme Court of the United States

October Term, 1970

No.....

WILLIAM F. JORDAN and WILLIAM A. ROGERS, on Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

MONTGOMERY WARD & CO., INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondent Montgomery Ward & Co., Incorporated ("Wards"), respectfully presents this brief in opposition to the Petition of William F. Jordan and William A. Rogers[1] ("Petitioners") for a Writ of Certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit dated May 3, 1971.

---

[1] Although the Petitioners have captioned their Petition as being "on behalf of themselves and all others similarly situated", and have attempted to argue the lower court's decision as though it applied to the class they purport to represent, the judgment sought to be reviewed does not purport to adjudicate the rights of anyone other than the named Petitioners and Wards. The specific question of whether claims under the Truth in Lending Act, more specifically, the claims of the Petitioners which were not dismissed, may be maintained as a class action is presently under advisement in the District Court.

INTRODUCTION

In accordance with Rule 40 of the Rules of this Court, Wards accepts the Petitioners' recital of the opinions delivered by the lower courts and the invocation of jurisdiction under 28 U.S.C.A. § 1254(1). However, Wards is dissatisfied with the Petitioners' formulation of the question presented, their statement of the statutory provisions involved, and their argumentative statement of the case, and presents its supplements and revisions below.

STATEMENT OF THE ISSUE

Does the civil liability section of the Truth in Lending Act, Section 130, create a private right of action for alleged violations of the Credit Advertising provisions of the Act, Sections 141-45?

The Eighth Circuit phrased the same question as follows: "[W]hether persons who plead that they were misled by and consummated credit transactions relying on advertisements not complying with the Credit Advertising provisions of the Act are entitled to maintain an action for civil liability as provided in Chapter 2 of the Act, specifically Section 130." (A-4)[2]

STATUTES INVOLVED

Outline of the Act. The Truth in Lending Act is the popular name given to Title I of the four-part Federal Consumer Credit Protection Act adopted by Congress in 1968. (P.L. 90-321; 82 Stat. 146).

---

[2]References herein to the "A-" and to the "P-" refer to the Appendix to the Petition, and to the Petition for a Writ of Certiorari, respectively.

The Act itself is divided into three chapters. Chapter 1[3] is entitled "General Provisions" and contains the definitions used in the Act, provisions governing the determination of what constitute or are included within the terms "finance charges" and "annual percentage rates" as employed in the Act, provisions relating to administrative enforcement and a section creating criminal liability for willful violations of the Act.

Chapter 2 is entitled "Credit Transactions". It contains provisions relating to the statements of credit terms which the Act requires to be made at certain times by creditors to their customers in connection with credit transactions covered by the Act, namely, consumer loans and sales under "open end" and other types of installment credit plans. Chapter 2 also contains a section creating civil liability for violations of its provisions.

Chapter 3 is entitled "Credit Advertising". Its provisions include certain prohibitions against the advertising of credit terms which are not generally available to all consumers, and sections governing the credit information which must be included in advertisements containing any of the specific terms of an open end credit plan, or in advertisements designed to promote other credit sales or loans.

Text of Pertinent Sections. The provisions of the Act which are of particular relevance to the question resolved in the lower courts are as follows:

---

[3]In United States Code Annotated, the word "Part" has been substituted throughout the Act for the word "Chapter" found in the official text. The letters "A", "B" and "C" have also been substituted for the numbers "1", "2" and "3", identifying the Chapters in the official text.

Chapter 1 — *General Provisions*

[15 U.S.C.A. §§ 1601-13.]

Section 108(a), (c), 15 U.S.C.A. § 1607(a), (c):

(a) Compliance with the requirements imposed under this title shall be enforced under

(1) section 8 of the Federal Deposit Insurance Act, in the case of

(A) national banks, by the Comptroller of the Currency.

(B) member banks of the Federal Reserve System (other than national banks), by the Board.

(C) banks insured by the Federal Deposit Insurance Corporation (other than members of the Federal Reserve System), by the Board of Directors of the Federal Deposit Insurance Corporation.

(2) section 5(d) of the Home Owners' Loan Act of 1933, section 407 of the National Housing Act, and sections 6(i) and 17 of the Federal Home Loan Bank Act, by the Federal Home Loan Bank Board (acting directly or through the Federal Savings and Loan Insurance Corporation), in the case of any institution subject to any of those provisions.

(3) The Federal Credit Union Act, by the Director of the Bureau of Federal Credit Unions with respect to any Federal credit union.

(4) the Act to regulate commerce, by the Interstate Commerce Commission with respect to any common carrier subject to those Acts.

(5) The Federal Aviation Act of 1958, by the Civil Aeronautics Board with respect to any air carrier or foreign air carrier subject to that Act.

(6) the Packers and Stockyards Act, 1921 (except as provided in section 406 of that Act), by the Secretary of Agriculture with respect to any activities subject to that Act.

* * * * *

(c) Except to the extent that enforcement of the requirements imposed under this title is specifically committed to some other Government agency under subsection (a), the Federal Trade Commission shall enforce such requirements. For the purpose of the exercise by the Federal Trade Commission of its functions and powers under the Federal Trade Commission Act, a violation of any requirement imposed under this title shall be deemed a violation of a requirement imposed under that Act. All of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title, irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.

Section 112, 15 U.S.C.A. § 1611:

Whoever willfully and knowingly

(1) gives false or inaccurate information or fails to provide information which he is required to disclose under the provisions of this title or any regulation issued thereunder.

* * * * *

(3) otherwise fails to comply with any requirement imposed under this title,

shall be fined not more than $5,000 or imprisoned not more than one year, or both.

Chapter 2 — *Credit Transactions*

[15 U.S.C.A. §§ 1631-44.]

Section 130(a), (e), 15 U.S.C.A. § 1640(a), (e):

(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this chapter to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

* * * * *

(e) Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Chapter 3 — *Credit Advertising*

[15 U.S.C.A. §§ 1661-5.]

Section 141, 15 U.S.C.A. § 1661:

For the purposes of this chapter, a catalog or other multiple-page advertisement shall be considered a single advertisement if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this chapter is clearly set forth.

Section 143, 15 U.S.C.A. § 1663:

No advertisement to aid, promote, or assist directly or indirectly the extension of consumer credit under an open end credit plan may set forth any of the specific terms of that plan or the appropriate rate determined under section 127(a) (5) unless it also clearly and conspicuously sets forth all of the following items:

(1) The time period, if any, within which any credit extended may be repaid without incurring a finance charge.

(2) The method of determining the balance upon which a finance charge will be imposed.

(3) The method of determining the amount of the finance charge, including any minimum or fixed amount imposed as a finance charge.

(4) Where periodic rates may be used to compute the finance charge, the periodic rates expressed as annual percentage rates.

(5) Such other or additional information for the advertising of open end credit plans as the Board may by regulation require to provide for adequate comparison of credit costs as between different types of open end credit plans.

STATEMENT OF THE CASE

On April 14, 1970, the Petitioners filed a two-count complaint against Wards.[4] Count I invokes the jurisdiction of the federal courts under Section 130 of the Truth in Lending Act, 15 U.S.C.A. § 1640. Its operative allegations are contained in eight separate subparagraphs of Paragraph 7, each of which purports to state a distinct claim for violation of a different provision or requirement of the Act, and/or of Regulation Z, 12 C.F.R. § 226, promulgated under the Act by the Board of Governors of the Federal Reserve System.

Five of the eight subparagraphs—b, e, f, g, and h (P-5, 6)—clearly allege violations of those provisions of the Act and Regulation Z which require the disclosure of certain credit terms on each periodic billing statement sent by a retailer to a credit customer who has an account under what the Act calls an "open end credit plan".[5] 15 U.S.C.A. § 1637(b); 12 C.F.R. §§ 226.5-6, 226.7(b).

The remaining subparagraphs of Paragraph 7 allege that while engaged in "advertising for sales, making credit sales,

---

[4]The second count, alleging violations of state usury laws, was dismissed by the district court because of the absence of diversity jurisdiction and the court's discretionary determination not to exercise pendent jurisdiction, on the ground that the usury claim presented exclusively a question of state law, a question already pending in the Minnesota courts in two similar actions, one of them being an action against Wards by counsel for the Petitioners.

[5]The term "open end credit plan" encompasses what are popularly called "revolving charge accounts".

and sending periodic statements to the Petitioners", Wards violated the Act:

> a. By failing to disclose that any finance charge is being imposed on items offered for sale and all as required by 12 C.F.R. 226.10;
>
> * * * * *
>
> c. By stating that no payments whatsoever are required until some future date, without disclosing the imposition of a finance charge thereon;
>
> d. By containing numerous pages of advertisements of products and prices without any reference to the imposition of finance charges. (P-5, 6)

Wards challenged the allegations contained in these three subparagraphs in a Rule 12 motion in the District Court, arguing that they relate exclusively to the credit advertising provisions of the Act, Sections 141-5, that violations of the credit advertising provisions are not privately actionable under Section 130 of the Act, and that therefore the Court lacked jurisdiction over the subject matter of the allegations.

The District Court granted Ward's motion to strike all three subparagraphs, but permitted the Petitioners to take an interlocutory appeal under 28 U.S.C.A. § 1292(b).

The Eighth Circuit unanimously affirmed the dismissal of the allegations contained in subparagraphs a and d, on the ground that violations of the Credit Advertising Chapter, Chapter 2 of the Act, are not privately actionable in the federal courts and that enforcement of such provisions has been relegated to various administrative agencies under Section 108 of the Act. It reinstated subparagraph c, however, for the reason, said the Court, that the allegations contained in that subparagraph could arguably be construed to allege violations of the Credit Transaction Chapter, Chapter 2 of the Act, which the civil penalties provision, Section 130, was designed to remedy. (A-7)

Thus, contrary to the impression attempted to be created in the Petition, the question decided by the lower courts and attempted to be raised in this Court arises on the pleadings themselves, not on their merits. The question is simply whether persons who allege that they were misled by advertisements not complying with the credit advertising provisions of the Act are entitled to make those allegations in a private federal court action under Section 130 of the Act. Beyond that, again contrary to inferences created in the Petition, the issue is not whether aggrieved persons have *any* remedy for credit advertising violations, since an administrative remedy clearly exists, but whether they have a private civil remedy for such violations.

INTRODUCTION TO ARGUMENT

The Petitioners have urged this case upon the Court as one of first impression under the Truth in Lending Act, as though novelty itself were sufficient to satisfy the "special-and-important" case criteria specified in Rule 19 of the Rules of this Court. Wards freely admits that the Eighth Circuit is the first appellate court to have decided the question presented. It submits, however, that the question does not merit the attention of this Court for the simple reason that, while first in time under the Act, the question is not a difficult one.

The question of whether a private action may be brought to redress violations of the credit advertising provisions of the Act was in no way perplexing to either the District Court for the District of Minnesota or the Eighth Circuit Court of Appeals, nor is its resolution by other courts likely to occasion any decisional conflict in the future. The answer to the question is that no private remedy for credit advertising violations exists. The answer can be gleaned, first of all, by reading the Act. Its only civil liability section, by its own

language, does not extend to advertising violations, but confines itself to violations of portions of the Act distinct from the advertising portions. If the language of the Act were not enough, its legislative history is crystal clear. On more than one occasion it says that "the Bill specifically exempts credit advertising from the application of civil penalties," or words to the same effect. H.R. 1040, 1968 U.S. Code, Cong. & Ad. News, p. 1976.

In short, the question raised by the Petitioners is neither sufficiently nor potentially "unsettled" as to require "settlement" by this Court on writ of certiorari, within the purview of Supreme Court Rule 19.

ARGUMENT

The Basic Structure of the Truth in Lending Act; Required Credit Disclosures v. Credit Advertisements

The Truth in Lending Act distinguishes the commercial advertising of credit from required statements of the terms of credit being applied to customers' charge accounts and loans. It includes separate bodies of substantive law for each of these subjects, as well as different remedies for violations of them.

Chapter 2 — Required "Initial" and "Periodic" Disclosures

The "Credit Transactions" provisions of the Act are contained in Chapter 2, Sections 121-34. With reference to open end, or "revolving", credit plans of the kind maintained by Wards, Chapter 2 requires two types of disclosures by a retailer to its customers: (1) an initial written statement of the credit terms which will be applied to the account, made once, and only once, to a customer opening a charge account [Section 127(a)], and (2) a periodic statement of the terms being applied to the account, made at the end of each billing cycle, generally once each month. [Section 127(b).] No

credit advertisement, whether contained in a catalog, newspaper or leaflet, or heard or seen on radio or television, is an "initial" or "periodic" disclosure, nor is any credit advertisement intended to satisfy the initial or periodic disclosure requirements of Section 127 of Chapter 2.

Chapter 3 — Credit Advertising

The "Credit Advertising" provisions of the Act are contained in Chapter 3, Sections 141-45. Section 143 of Chapter 3 essentially requires that if a retailer advertises "any of the specific terms" of its revolving credit plan, it must also "clearly and conspicuously set forth" various additional credit information, including much of the same information which would be contained in an "initial" or "periodic" disclosure submitted to a credit customer under Section 127.

In the case of a credit advertisement in a catalog, the requirements of Section 143 are subject to the qualification, stated in Section 141, that the entire catalog will be considered a single advertisement "if it clearly and conspicuously displays a credit terms table on which the information required to be stated under this chapter is clearly set forth."

There is no special magic about a credit advertisement in a catalog, however, as distinguished from an advertisement of credit terms by any other commercial means. Section 226.2(b) of Regulation Z defines an "advertisement" as:

> "[A]ny commercial message in any newspaper, magazine, leaflet, flyer or catalog, on radio, television or public address system, in direct mail literature or other printed material, on any interior or exterior sign or display, in any window display, in any point-of-transaction literature or price tag which is delivered or made available to a customer or prospective customer in any manner whatsoever."

The scope of this definition itself should occasion a natural wariness for any conclusion that "credit advertising" dis-

putes are to become grist for the mill of the federal judiciary, without regard to their significance or the amount in controversy. Only the most explicit grant of federal jurisdiction and the clearest legislative intent should authorize the creation of a civil remedy which would permit any person who sees or hears a credit adverstisement, in any form in which it might appear, to have his day in a federal court to prove what he saw or heard and how it injured him. Neither statutory authorization nor congressional purpose, however, is anywhere in evidence in this case, and the lower courts so found.

The Sole Civil Remedy — Violations of Chapter 2

Section 130 of the Act, contained in Chapter 2, is the only provision in the Act creating a private right of action, and, as a consequence, the sole grant of federal jurisdiction in it. As the Eighth Circuit noted, however, the language of Section 130 is limited. (A-6) It creates a right of action for statutorily-defined penalties in favor of an individual against any creditor who fails "in connection with any consumer credit transaction" to disclose any information required to be disclosed "*under this Chapter* . . . to that person." "This Chapter" refers to Chapter 2. The principle of statutory construction, *expressio unius est exclusio alterius*, clearly applies to such restrictive language. The expression in Section 130 of its applicability to the Chapter in which it is contained, Chapter 2, plainly negatives its applicability to Chapter 3.

As previously stated, the disclosures required to be made by Chapter 2 in connection with credit transactions involving open end credit plans are the initial pre-account disclosure and the periodic statement disclosures. It is the failure to make proper initial and periodic disclosures, that is, the

non-disclosure or the erroneous making of disclosures required by Chapter 2, which is privately actionable under Section 130, and nothing else.

The dismissal of the allegations of the complaint affirmed by the Eighth Circuit was the dismissal of allegations purporting to state claims for violations of Chapter 3—the Credit Advertising Chapter. The allegations stricken are exclusively directed, not against alleged erroneous initial or periodic disclosures made by Wards under Chapter 2, but against advertisements by Wards in its catalogs of the terms upon which Wards will extend credit to purchasers of its merchandise. Subparagraph d of Paragraph 7 alleges a violation of Section 143 of Chapter 3, dealing with the advertising of open end credit plans, while subparagraph a alleges a violation of Section 226.10 of Regulation Z, adopted to implement the provisions of the Credit Advertising Chapter. But the Act creates no private right of action for violations of its credit advertising provisions, and violations of Chapter 3 are not actionable under Section 130 of Chapter 2.

Legislative History: Civil Remedy for Advertising Violations Withheld

The legislative history of the Act discloses that the withholding of a private civil remedy for credit advertising violations was intentional.

As originally introduced and passed in the Senate, the Act contained no reference to credit advertising. S. 5, 90th Cong., 1st Sess., January 11, 1967; July 12, 1967. The original House version did contain provisions relating to the advertising of credit terms. Although providing civil penalties for wrongful disclosures concerning credit transactions, it said nothing about credit advertising violations. H.R. 11601, 90th Cong., 1st Sess., § 206, p. 22, July 20, 1967. Later versions

of the House bill specifically excluded the credit advertising provisions from the application of the section relating to civil penalties. Ibid., p. 26, November 30, 1967; December 13, 1967.

Ultimately, the House bill was adopted by Congress in the form in which the Act now appears, with the "Credit Transactions" and "Credit Advertising" provisions contained in separate chapters, and with no private civil remedy provided for advertising violations.

The committee report which accompanied the bill submitted to the House on December 13, 1967, contains a statement, quoted by the Eighth Circuit in its opinion (A-6), as follows:

> "[*T*]*he bill specifically exempts credit advertising from the application of civil penalties.* This exemption has been written into the bill by your committee to avoid the possibility that anyone, not a party to an actual transaction, seeing an advertisement not complying with the disclosure requirements of the bill would attempt to seek civil penalties." H.R. 1040, 1968 U.S. Code Cong. & Ad. News, p. 1976 [Emphasis added.].[6]

The reason given by the House committee for withholding a civil remedy for advertising violations, that is, to discourage a form of opportunism, in no way qualifies or obscures the fact that the civil remedy was withheld from everyone, including a person who sees or hears an advertisement and subsequently makes a credit purchase in reliance on it. By the same token, because the civil remedy was withheld from everyone, the already overburdened courts have been spared

---

[6]See 1 CCH. Consumer Credit Guide. ¶2,000. "Enforcement" ("It is significant to note that the provisions relative to civil actions by private individuals do not cover credit advertising.") (1970). The Federal Reserve Board has issued informal letters concluding that the civil liability section does not extend to credit advertising violations. 3 CCH. Consumer Credit Guide. ¶30,034 (June 6, 1969); ¶30,408 (April 22, 1970).

from a myriad of private actions involving individual fact questions of reliance or lack of it.

A statement similar to that contained in the committee report was read into the Congressional Record by Congressman Wright Patman of Texas, Chairman of the House Committee on Banking and Currency, on the opening day of debate on the Consumer Credit Protection Act, January 30, 1968. In discussing the enforcement provisions of the Truth in Lending Act, Congressman Patman stated:

> "While provision is made in the bill for civil and criminal penalties, it is anticipated that the major enforcement activities will be carried out under the administrative enforcement provisions. It should be noted that while credit advertising is covered under certain of the disclosure provisions of the bill, such advertising cannot provide the basis for a civil suit. This exemption has been written into the bill by your committee to avoid the possibility that anyone seeing an advertisement not complying with [the] disclosure requirements would attempt to seek civil penalties." Cong. Rec., Jan. 30, 1968, p. H. 502.

These statements from the committee report and the House debate on the Act are clear manifestations of legislative intent, entirely consistent with the unambiguous language of a statute which actually requires no assist from legislative history in its interpretation.

Enforcement of Credit Advertising Provisions Reserved to Administrative Agencies

The theme of the Petitioners' request to this Court to review the judgment of the Eighth Circuit appears to lie in their assertion that the denial of a private right of action for credit advertising violations "is a severe hindrance to effective administration of the law." (P-9) This argument is little more than a warmed-over version of the Petitioners' ar-

gument in the lower courts that the absence of a private civil remedy leaves them virtually without any remedy. That is not at all true, however, as both of the lower courts recognized.

The Act entrusts the enforcement of its credit advertising provisions to one of a number of administrative agencies, depending upon the type of creditor involved. (See, pp. 4-5, supra). In Section 108(c), 15 U.S.C.A. § 1607(c), the Federal Trade Commission has been awarded general enforcement authority with respect to all creditors whose supervision is not specifically committed to other agencies, an investiture which, among other things, makes the FTC responsible for obtaining compliance with the Act by most retail merchandisers, including Wards.[7]

Section 108(c) provides in part that "all of the functions and powers of the Federal Trade Commission under the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this Title . . . ." Among the FTC's powers under Section 5 of the Federal Trade Commission Act are the power to institute proceedings by complaint, to permit intervention in such proceedings by interested persons, to make findings of fact, and to issue cease and desist orders based upon violations of law determined to exist. Review of FTC cease and desist orders is available in courts of appeals.

The Petitioners therefore have recourse for violations of the Credit Advertising Chapter, but not in a private suit in the federal courts.

Finally, it should not be at all surprising that Congress saw fit to provide an administrative framework within which

---

[7]In addition, the Act contains a criminal liability provision, Section 112, which provides for fines up to $5,000 or imprisonment for one year, or both, for willful violations of its requirements, including credit advertising violations.

the Act was to be enforced, or that the FTC was assigned the primary enforcement role with reference to the credit advertising sections. For the most part, the enforcement machinery was already in existence. The retailers, credit agencies and lending institutions covered by the Act had long been subject to the regulatory jurisdiction of the federal agencies specifically created to deal with their respective problems.[8] Furthermore, the FTC has historically been charged with the responsibility for preventing all unfair trade practices in commerce, including deceptive advertising, under the Federal Trade Commission Act. This historical regulatory pattern was continued by Congress in Section 108 of the Act.

As the District Court observed in its memorandum opinion, the general grant of authority in Section 108 "alerts this Court to the fact that unless otherwise clearly indicated the remedies for violations of the Act were intended by Congress to be administrative in nature." (A-10) Far from a "clear indication" of legislative intent to provide a civil remedy for credit advertising violations, however, it is quite apparent, in the words of the Eighth Circuit that "it was the intent of the Congress not to provide private civil relief for violation of the credit advertising provisions." (A-5-6)

---

[8]In that regard, Congresswoman Leonor K. Sullivan of Missouri, the principal sponsor of the Act and the Chairwoman of the Consumer Affairs Subcommittee of the House Committee on Banking and Currency, stated during the debate in the House: "Unlike S. 5, the truth-in-lending provisions of H.R. 11601 are not 'self-enforcing'; instead we provided necessary administrative enforcement by appropriate government agencies—the same agencies which now have regulatory jurisdiction over the businesses which would be covered by the disclosure requirements of this bill.". Cong. Rec., Jan. 30, 1968, p. H. 508.

CONCLUSION

For all of these reasons, Wards respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

O'Connor, Green, Thomas,
Walters & Kelly
Kenneth W. Green
Joe A. Walters
Frank J. Walz
845 Northwestern Bank Building
Minneapolis, Minnesota 55402
Attorneys for Respondent

July 20, 1971.

70-320

Supreme Court, U.S.
FILED
AUG 4 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1865

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others
Similarly Situated,

Petitioners,

vs.

MONTGOMERY WARD & CO.,
Incorporated,

Respondent.

PETITIONERS' REPLY BRIEF

SIGAL & SAVELKOUL
DONALD C. SAVELKOUL
SAMUEL I. SIGAL
1020 Plymouth Building
Minneapolis, Minnesota 55402
Attorneys for Petitioners

35 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

INDEX

		PAGE
I.	Introduction	1
II.	A catalog purchaser is not to be equated with a viewer of an "advertisement"	3
III.	Only catalog customers are involved in this case	5
IV.	Legislative history cited is not applicable to this case	6
Conclusion		8

AUTHORITIES CITED

	PAGE
28 U.S.C. 1292(b)	2
15 U.S.C. 1640(a)	3, 5, 6, 7, 8
15 U.S.C. 1637(a)	5, 8
1968 U.S. Code Cong. & Adm. News, p. 1976	6
1968 U.S. Code Cong. & Adm. News, pp. 2021 et seq.	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1865

WILLIAM F. JORDAN and WILLIAM A. ROGERS,
on Behalf of Themselves and All Others
Similarly Situated,

Petitioners,

vs.

MONTGOMERY WARD & CO.,
Incorporated,

Respondent.

PETITIONERS' REPLY BRIEF

I

Introduction

Respondent's brief in opposition appears to concentrate exclusively on the proposition that the decision of the lower court was correct, and therefore review by certiorari is unnecessary. It states that the question is "not a difficult one" and infers that the matter was "in no way perplexing" to either the District Court or the Circuit Court. (R-9)[1]

[1] References herein to "A" and "R" refer to the Appendix to the Petition, and to the Respondent's Brief in opposition to the Petition for a Writ of Certiorari, respectively.

This argument falls simply on the procedural basis by which the case presents itself. First, the District Court certified the case under 28 U.S.C. §1292(b) as involving a controlling question of law as to which there is substantial ground for difference of opinion. In its certifying order,[2] the District Court stated as follows:

> "THERE ARE SUFFICIENT GROUNDS FOR DIFFERENCE OF OPINION TO CERTIFY THE ORDER FOR APPEAL.
>
> "Plaintiffs point out the fact that they are catalogue customers and allege that credit advertising plays a different role in connection with a catalogue sale than it does in the conventional retail sale. It is also possible to construe the legislative history of the Act in a different manner than this Court did. Obviously this Court thinks its interpretation of the Act is the proper one. However, it must respect plaintiffs' contentions that a contrary interpretation can be supported and that the dismissal of the contested portions of the complaint might have been in error. Cf. *Brunswick Corp. v. Chrysler Corp.*, 291 F. Supp. 117 (D.C. Wis. 1968).
>
> "AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION.
>
> "In light of plaintiffs' contention that the advertising of credit and the credit transaction are peculiarly intertwined in a catalogue sale, the credit transaction issues currently remaining in the case might have to be completely retried if this Court's ruling were reversed upon appeal after trial on the merits. Cf. *Shawe v. Wendy Wil-*

[2] The order is contained in pp. 29-30 of the Appendix in the Court of Appeals proceedings, which is a part of the certified transcript of record.

son, Inc., 25 F.R.D. 1 (D.C.N.Y. 1960); *Cataldo v. E. I. duPont de Nemours & Co.*, 253 F. Supp. 235 (D.C.N.Y. 1966)."

Second, if the question involved were as simple as respondent claims, the Court of Appeals would not have permitted a purely discretionary appeal. It is submitted, therefore, that the question has been thought more "difficult" and "perplexing" by both the District Court and Court of Appeals than the respondent would have us believe.

II

A Catalog Purchaser Is Not to Be Equated With a Viewer of an "Advertisement"

The bulk of respondent's brief is devoted to the proposition that the civil liability provisions [15 U.S.C. §1640(a), *infra*] of Part B of Truth in Lending do not apply to credit advertising violations under Part C of that Act. We do not contend so. Our contention is that the catalog merchandiser in this case has violated Part B, and that the catalog can be used to prove the violation.

The issue in this case is whether a catalog consumer credit customer who purchases from a non-complying catalog amending an original disclosure, and in reliance on the statements therein contained has a private cause of action under Part B of the Truth in Lending Act.

It is very simple for respondent to say that (1) there is no civil liability for Part C credit advertising violations; (2) that a catalog is advertising, and that (3) therefore there is no civil liability for whatever statements may be made in a catalog. This reasoning, if accepted, would make the Truth in

Lending Act a nullity for the catalog consumers of this country with respect to a private right of action under 15 U.S.C. §1640(a).

Under respondent's theory, all the catalog merchandiser has to do is put out an original disclosure. Then, he may proceed to do as he pleases through his catalog and completely change his financing plan and charges in subsequent issues without any civil liability on the ground that the catalog is mere advertising. (The subsequent periodic statement is of no aid to the consumer, because by that time the merchandise has been purchased and consumed or used, and the finance charge incurred.)

Obviously, if a non-catalog merchandiser amended his original disclosure by a non-complying letter to customers, he would be subject to the civil liability provisions of Part B of the Truth in Lending Act. The catalog merchandiser deals with his customers by catalogs, and if he amends his original disclosure in a subsequent catalog, he should stand on the same footing as a non-catalog merchandiser.

There is nothing in Truth in Lending that says catalog consumers have fewer rights than non-catalog consumers, or that catalog merchandisers are exempt from the civil liability provisions.

III

Only Catalog Customers Are Involved in This Case

The complaint and the facts of the case show that Jordan and Rogers are catalog purchasers. The class consists of catalog purchasers.[3] The plaintiffs are not mere readers of advertisements.

Therefore, it is only necessary to consider whether they are able to prove a violation of 15 U.S.C. 1640(a) which provides in part as follows:

> "(a) Except as otherwise provided in this section, any creditor who fails *in connection with* any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of . . ." (Emphasis supplied.)

Consumer credit transactions occurred. The question is whether the plaintiffs may introduce in evidence the catalog pages which induced them to make the purchases and upon which they relied and which were "in connection with" consumer credit transactions.

The information required under Part B, 15 U.S.C. 1637(a), (1), (2), (3), and 12 CFR 226.7(a), (e), (f),[4] was not supplied to petitioners in the catalog amendments.

A catalog is the representative of the catalog merchandiser in the consumer's home. Simply by the catalog one can place a purchase order on forms provided or by phoning the catalog office. It is the consumer's contact as to the merchandiser's

---

[3] Transcript of Record, Appendix, p. 6.
[4] A-14, 15; A-19, 20, 24, 25.

policies. So although a catalog may be a form of advertising, the catalog is also a comprehensive document of company policies. It seems clear that catalog customers are entitled to introduce, as part of the evidentiary history, the catalog pages which were in connection with a consumer credit transaction claim under 15 U.S.C. 1640(a), *supra*.

IV

Legislative History Cited Is Not Applicable to This Case

The authorities cited by respondent do not relate to the facts of the present case which solely involves catalog customers who have made purchases. For example, the following quotation from House Report No. 1040[5] is mentioned:

> ". . . [T]he bill specifically exempts credit advertising from the application of civil penalties. This exemption has been written into the bill by your committee to avoid the possibility that anyone, *not a party to an actual transaction, seeing* an *advertisement* not complying with the disclosure requirements of the bill would attempt to seek civil penalties." 1968 U.S. Code, Cong. & Adm. News, p. 1976. (Emphasis supplied.)

This quotation relating to the earlier House bill is of no relevance to the present case among other reasons because (1) here there are parties to an actual transaction, (2) the

---

[5] House Report No. 1040 was dated Dec. 13, 1967, to accompany H.R. 11601. In enacting the Consumer Credit Protection Act on May 22, 1968, the Congress passed the Senate bill (S. 5) in lieu of the House bill after substituting for its language much of the text of the House bill. The statement of the manager on the part of the House on the conference bill is contained in Conference Report No. 1397. 1968 U.S. Code, Congressional and Administrative News, pp. 2021 et seq.

present case does not involve mere "seeing"; instead, it involves purchases in reliance on statements made, (3) the instant case involved a catalog, not a simple advertisement in a newspaper or other advertising media.

There is nothing in the general tenor of the congressional debate on Truth in Lending as we have read it to indicate an exemption from the civil liability provisions of 15 U.S.C. 1640(a), *supra*, for catalog houses, which would be the result of a holding that catalogs amending original disclosures are mere advertising. To the contrary, the catalog houses were most concerned as to methods of interest computation and other matters, and a representative of respondent appeared for all the catalog houses.[6]

Respondent's Administrative Agency Argument Not in Point

Respondent argues that the Federal Trade Commission has jurisdiction over credit advertising violations. We agree.

But we are not bringing this action under Part C, which relates to credit advertising. We are bringing it under Part B for catalog customers who have entered into consumer credit transactions.

Part B, Sec. 1640(a), *supra*, specifically authorizes private civil actions. The fact that the Federal Trade Commission also has jurisdiction in Part B cases in no way deprives an individual from bringing a private action which the Congress has given him.

---

[6] Congressional Record, House, January 30, 1968, p. 1437. Some other references to respondent appear on pp. 1442, 1438 and 1590.

CONCLUSION

Here, the claim of a catalog customer is that he purchased merchandise in January upon a stated term of "No monthly payments till June." There was no catalog disclosure that a finance charge would be imposed based on purchase date, rather than the June date. The catalog statement constituted a material amendment of its original disclosure, and was not in compliance with the full disclosure requirements of Truth in Lending, Part B, because there was no disclosure of the time period within which the credit extended could be paid without incurring a finance charge, the balance upon which the finance charge would be imposed, and the percentage rate of the finance charge (15 U.S.C. Sec. 1637(a), *supra*).

These deficiencies constitute violations of 15 U.S.C. 1640(a), and give the catalog consumer a private right of action thereunder. In maintaining such action, he may plead the catalog contents and introduce the same in evidence. The catalog consumer credit customer has the same right of action under the civil liability provisions of the Truth in Lending Act as a non-catalog consumer credit customer.

Respectfully submitted,

SIGAL & SAVELKOUL
DONALD C. SAVELKOUL
SAMUEL I. SIGAL
1020 Plymouth Building
Minneapolis, Minnesota 55402
Attorneys for Petitioners